TUAN MAT TUAN ISMAIL v. TAN AH HIN & ORS

COURT OF APPEAL, PUTRAJAYA
UMI KALTHUM ABDUL MAJID JCA
ABDUL RAHMAN SEBLI JCA
ZALEHA YUSOF JCA
[CIVIL APPEAL NO: B-01(NCVC)(W)-79-03-2017]
7 FEBRUARY 2019

CONTRACT: *Breach – Settlement agreement – Appellant entered into settlement agreement with first and second respondents – Whether first and second respondent wrongfully removed appellant as director of company – Whether first and second respondents' act of re-transferring shares from appellant to themselves after fourth respondent obtained High Court judgment premature and against terms of settlement agreement – Whether High Court judgment final judgment – Whether appellant's breach of settlement agreement entitled respondents to rescind contract*

CIVIL PROCEDURE: *Judgments and orders – Judgment handed down by Terengganu High Court – Judgment determined Terengganu State Government's liability to pay damages to fourth respondent company – Judgment pending assessment of damages –Whether damages to be assessed merely consequential process – Whether Terengganu High Court judgment final judgment*

The appellant's claim arose from a settlement agreement entered into between him and the first to fourth respondents. The settlement agreement spelt out in express terms the rights and obligations of the appellant and the first to the third respondents with respect to the management and ownership of the fourth respondent, SKKPK(TM) Sdn Bhd. The background facts were that the fourth respondent had commenced an action against the Terengganu State Government at the High Court ('the Terengganu Civil Suit') for the termination of a timber concession agreement. The first and second respondents had entered into the settlement agreement with the appellant in relation to the Terengganu Civil Suit and the agreed terms were, *inter alia* (i) that the appellant shall liaise, negotiate and come up with a settlement plan for the fourth respondent with the State Government of Terengganu in respect of the Terengganu Civil Suit ('the final settlement amount'); (ii) as consideration, the first and second respondents shall transfer 4.9 million shares in the fourth respondent to the appellant; (iii) the purpose of the transfer of the 4.9 million shares to the appellant was to secure the final settlement amount with the Terengganu State Government either by way of entering into a consent judgment or by way of a final judgment obtained from the court ('the final date'); (iv) that the appellant shall re-transfer the 4.9 million shares to the first and second respondents only after a consent judgment was entered into or after a final judgment had been obtained from the court. After a full trial of the Terengganu Civil Suit, judgment was entered in favour of the fourth respondent against the Terengganu State Government on liability and an order was made for damages to be assessed. The hearing of the assessment of damages was still continuing and the

quantum of damages to be awarded had not yet been determined. The appellant alleged that there was a breach of the settlement agreement, particularly by the first and second respondents in that they had wrongfully removed him as a director of the fourth respondent and had wrongfully transferred shares, owned by him in the fourth respondent, prematurely and in breach of the relevant terms of the settlement agreement. The appellant sought for, *inter alia*, the following declaratory reliefs (i) a declaration that the settlement agreement was valid and binding on the first and second respondents; (ii) an order directing the first, second and third respondents to refrain from selling, disposing of and transferring the 4.9 million shares in the fourth respondent pending disposal of the action; (iii) an order directing that the appellant be retained as a director of the fourth respondent; and (iv) an order that the transfer of the 4.9 million shares in the fourth respondent to the second and third respondents be deemed invalid, void and of no effect. The issues that arose were (i) whether the first and second respondents' act of re-transferring the 4.9 million shares from the appellant to themselves after the fourth respondent obtained the Terengganu High Court judgment was premature and against the terms of cl. 2 of the settlement agreement; and (ii) whether the Terengganu High Court judgment was a 'final judgment', which by para. 2 cl. 2 of the settlement agreement also referred to 'final date' and 'final settlement amount'.

Held (dismissing appeal)

Per Abdul Rahman Sebli JCA delivering the judgment of the court:

(1) The Terengganu High Court judgment was indeed a final judgment as it had finally determined the Terengganu State Government's liability to pay damages to the fourth respondent for its wrongful termination of the timber concession agreement. Clearly, the Terengganu High Court judgment on liability was not a provisional or temporary judgment. It was a judgment that was reached after a full hearing, during which both oral and documentary evidence were adduced by the parties. The order for payment of damages was implicit in the judgment, except that the quantum was to be determined by way of assessment by the Senior Assistant Registrar. The fact that damages was to be assessed was merely a consequential process to determine the quantum that the fourth respondent was entitled to. However, in so far as the judgment itself was concerned, it was a final judgment. (paras 32, 37, 38 & 39)

(2) Under cl.2 of the settlement agreement, it was agreed by the parties that 'final judgment' means the 'final settlement amount' which was to be procured either through an out of court settlement or through a court judgment. But that was a private arrangement between the parties. Being a private arrangement between the parties, it could not have the effect of determining the finality of the court judgment. It was not for the parties to decide if the Terengganu High Court judgment was final or otherwise. That would be to usurp the function of the court. (paras 41 & 42)

(3) What was agreed between the parties was that the first and second respondents had the right to re-transfer the shares to themselves once the Terengganu State Government was held by the court to be liable to pay damages to the fourth respondent. That was exactly what the High Court decided in the Terengganu Civil Suit, and that was all that was required to trigger enforcement of the second paragraph of cl. 2 of the settlement agreement. There was also another reason why the Terengganu High Court judgment on liability was a final judgment and this was because it was appealable without leave of the court. Only a judgment or order that was final in effect could be appealed against. The fact that the matter had been fixed for assessment of damages was irrelevant if otherwise the judgment on liability was final in effect. It was therefore incorrect for the appellant to say that the Terengganu High Court judgment only became final after the 'final settlement amount' (damages) had been determined by the court. (paras 43 & 44).

(4) The appellant's breach of the settlement agreement entitled the respondents to put an end to the agreement as the breach was of a fundamental nature going to the root of the contract. The appellant was supposed to discharge his obligations under the settlement agreement, but, in breach of the agreement, he failed to do so, and yet insisted that he should retain the 4.9 million shares for himself on the purported ground that no 'final judgment' or 'final settlement amount' had been obtained from the court. Under the circumstances, the respondents had the right to rescind the contract and to seek restitution of the parties to the *status quo*. (paras 61-63)

(5) The trial judge was perfectly entitled to come to a finding that the appellant had breached the settlement agreement. The appellant himself admitted that he failed to comply with cl. 2 and cl. 4(b) of the settlement agreement. The breach had therefore been established by the appellant's own admission. As for the appellant's removal from the fourth respondent, the appellant failed to show that his removal was not in accordance with the law or the Articles of Association of the fourth respondent. (paras 64, 70, 71 & 72)

Bahasa Malaysia *Headnotes*

Tuntutan perayu timbul daripada satu perjanjian penyelesaian yang dimeterai antaranya dan responden pertama hingga responden keempat. Perjanjian dengan jelasnya menyatakan hak-hak dan obligasi-obligasi perayu dan responden pertama hingga ketiga berkaitan pengurusan dan milikan responden keempat, SKKPK (TM) Sdn Bhd. Fakta latar belakang adalah bahawa responden keempat telah memulakan guaman terhadap Kerajaan Negeri Terengganu di Mahkamah Tinggi ('Guaman Sivil Terengganu') untuk pembatalan satu perjanjian konsesi balak. Responden pertama dan kedua telah memeterai satu perjanjian penyelesaian dengan perayu berhubung Guaman Sivil Terengganu dan syarat-syarat yang disetujui, antara lain,

adalah (i) perayu akan berhubung, berunding dan menentukan satu pelan penyelesaian untuk responden keempat dengan Kerajaan Negeri Terengganu berkaitan Guaman Sivil Terengganu ('jumlah penyelesaian muktamad'); (ii) sebagai balasan, responden pertama dan kedua akan memindah milik 4.9 juta saham dalam responden keempat kepada perayu; (iii) tujuan pindah milik 4.9 juta saham kepada perayu adalah untuk menjamin jumlah penyelesaian akhir dengan Kerajaan Negeri Terengganu sama ada melalui memasuki satu penghakiman persetujuan atau melalui penghakiman muktamad yang diperoleh daripada mahkamah ('tarikh muktamad'); (iv) bahawa perayu akan memindah milik 4.9 juta saham kepada responden pertama dan kedua hanya selepas penghakiman persetujuan dimasuki atau selepas satu penghakiman muktamad telah diperoleh daripada mahkamah. Selepas satu perbicaraan penuh Guaman Sivil Terengganu, penghakiman telah disampaikan memihak pada responden keempat terhadap Kerajaan Negeri Terengganu atas liabiliti dan satu perintah taksiran ganti rugi dibuat. Perbicaraan taksiran ganti rugi masih berterusan dan kuantum ganti rugi yang perlu diawardkan masih belum ditentukan. Perayu mendakwa bahawa terdapat pelanggaran perjanjian penyelesaian, khususnya oleh responden pertama dan kedua kerana mereka telah, dengan salah, menyingkirkannya sebagai pengarah responden keempat dan telah, dengan salah, memindah milik saham-saham miliknya dalam responden keempat secara pramatang dan melanggar terma-terma relevan perjanjian penyelesaian. Perayu menuntut, antara lain, relief-relief pengisytiharan berikut (i) satu pengisytiharan bahawa perjanjian penyelesaian adalah sah dan mengikat responden pertama dan kedua; (ii) satu perintah mengarahkan responden pertama, kedua dan ketiga ditahan daripada menjual, melupuskan dan memindah milik 4.9 juta saham dalam responden keempat sementara menunggu pelupusan guaman; (iii) satu perintah mengarahkan perayu dikekalkan sebagai pengarah responden keempat; dan (iv) satu perintah pindah milik 4.9 juta saham dalam responden keempat kepada responden kedua dan ketiga dianggap tidak sah, terbatal dan tiada kesan. Isu-isu yang berbangkit adalah (i) sama ada tindakan responden pertama dan kedua memindah milik semula 4.9 juta saham daripada perayu kepada mereka sendiri selepas responden keempat memperoleh penghakiman Mahkamah Tinggi Terengganu adalah pramatang dan bertentangan syarat-syarat kl. 2 perjanjian penyelesaian; dan (ii) sama ada penghakiman Mahkamah Tinggi Terengganu adalah 'penghakiman muktamad', iaitu per. 2 kl. 2 perjanjian penyelesaian juga merujuk pada 'tarikh muktamad' dan 'jumlah penyelesaian muktamad'.

Diputuskan (menolak rayuan)

Oleh Abdul Rahman Sebli HMR menyampaikan penghakiman mahkamah:

(1) Penghakiman Mahkamah Tinggi Terengganu adalah satu penghakiman muktamad kerana akhirnya menentukan liabiliti Kerajaan Negeri Terengganu untuk membayar ganti rugi kepada responden keempat untuk pembatalan, secara salah, perjanjian konsesi pembalakan. Dengan jelasnya, penghakiman liabiliti Mahkamah Tinggi Terengganu bukan

satu penghakiman sementara. Penghakiman itu adalah penghakiman yang dicapai selepas perbicaraan penuh, yang semasa perbicaraan pihak-pihak telah mengemukakan keterangan lisan dan dokumentar. Perintah pembayaran ganti rugi adalah tersirat dalam penghakiman, kecuali kuantum perlu ditentukan melalui taksiran oleh Penolong Kanan Pendaftar. Fakta bahawa ganti rugi perlu ditaksirkan hanya proses yang berbangkit untuk menentukan kuantum yang berhak diperoleh oleh responden keempat. Tetapi setakat penghakiman itu sendiri, ini adalah satu penghakiman muktamad.

(2) Bawah kl. 2 perjanjian penyelesaian, pihak-pihak bersetuju bahawa 'penghakiman muktamad' bermaksud 'jumlah penyelesaian muktamad' yang akan diperolehi sama ada melalui penyelesaian luar mahkamah atau melalui penghakiman mahkamah. Tetapi itu adalah aturan peribadi antara pihak-pihak. Sebagai aturan peribadi antara pihak-pihak, ini tidak mempunyai kesan menentukan kemuktamadan penghakiman mahkamah. Bukan untuk pihak-pihak menentukan jika penghakiman Mahkamah Tinggi Terengganu adalah muktamad atau sebaliknya. Itu adalah perampasan kuasa mahkamah.

(3) Pihak-pihak bersetuju bahawa responden pertama dan kedua mempunyai hak memindah milik semula saham-saham kepada mereka sendiri apabila mahkamah memutuskan Kerajaan Negeri Terengganu bertanggungjawab membayar ganti rugi kepada responden keempat. Mahkamah Tinggi telah memutuskan sedemikian dan itu sahaja yang diperlukan untuk mencetuskan penguatkuasaan perenggan kedua kl. 2 perjanjian penyelesaian. Terdapat juga alasan lain mengapa penghakiman Mahkamah Tinggi Terengganu atas liabiliti adalah penghakiman muktamad dan ini adalah kerana penghakiman ini boleh dirayu tanpa kebenaran mahkamah. Hanya penghakiman atau perintah yang muktamad boleh dirayu. Fakta bahawa perkara telah ditentukan untuk taksiran ganti rugi tidak relevan jika penghakiman liabiliti muktamad. Oleh itu, perayu silap apabila menyatakan penghakiman Mahkamah Tinggi Terengganu hanya menjadi muktamad selepas 'jumlah penyelesaian muktamad' (ganti rugi) ditentukan oleh mahkamah.

(4) Pelanggaran perjanjian penyelesaian oleh perayu memberi hak kepada responden-responden menamatkan perjanjian kerana pelanggaran tersebut adalah satu sifat asas yang menjadi akar umbi kontrak. Perayu sepatutnya menunaikan tanggungjawabnya bawah perjanjian penyelesaian, tetapi dalam melanggar perjanjian, gagal berbuat demikian, tetapi menegaskan bahawa dia harus mengekalkan 4.9 juta saham untuk dirinya sendiri atas alasan tiada 'penghakiman muktamad' atau 'jumlah penyelesaian muktamad' telah diperoleh daripada mahkamah. Dalam keadaan demikian, responden-responden mempunyai hak membatalkan kontrak dan mendapatkan restitusi pihak-pihak kepada *status quo.*

(5) Hakim bicara berhak membuat dapatan bahawa perayu telah melanggar perjanjian penyelesaian. Perayu sendiri mengakui dia gagal memenuhi kl. 2 dan kl. 4(b) perjanjian penyelesaian. Pelanggaran telah dibuktikan melalui pengakuan perayu sendiri. Berkenaan penyingkiran perayu daripada responden keempat, perayu gagal menunjukkan bahawa penyingkirannya tidak mematuhi undang-undang atau Artikel Persatuan responden keempat.

Case(s) referred to:
Bozson v. Altrincham Urban Council [1903] 1 KB 547 ***(refd)***
S & M Jewellery Trading Sdn Bhd & Ors v. Fui Lian-Kwong Hing Sdn Bhd [2015] 8 CLJ 16 FC ***(refd)***
Samar Mansor v. Mustafa Kamarul Arifin [1974] 1 LNS 147 FC ***(refd)***
Superintendent of Lands and Surveys, 4th Division & Anor v. Hamit Matusin & Ors [1994] 3 CLJ 567 SC ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 40

Other source(s) referred to:
Halsbury's Laws of England, 4th edn, para 506

For the appellant - Gurdit Singh, Vasanthan Gopalan & Nashvinder Singh Gill; M/s Sharif & Khoo
For the 1st - 4th respondents - Emir Eizat Ab Malik & Fairuzhazwani Abdul Rahim; M/s Enna Nadra Yacob
For the 5th respondent - Aida Adhha Abi Bakar & Fadilah Abd Wahab; SFCs

[Editor's note: For the High Court judgment, please see Tuan Mat Tuan Ismail v. Tan Ah Hin & Ors [2017] 1 LNS 845 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Rahman Sebli JCA:

[1] We heard and dismissed the appellant's appeal and affirmed the decision of the High Court dismissing his claim against the respondents. These are the grounds of our decision.

[2] The appellant's claim arose from a settlement agreement dated 22 February 2010 entered into between him and the first to the fourth respondents. The settlement agreement spelt out in express terms the rights and obligations of the appellant and the first to the third respondents with respect to the management and ownership of the fourth respondent, SKKPJ (TM) Sdn Bhd.

[3] The fifth respondent, Suruhanjaya Syarikat Malaysia, was brought in as a nominal defendant by the appellant to carry out its statutory functions under the relevant laws.

[4] The appellant alleged that there was a breach of the settlement agreement, particularly by the first and second respondents (Tan Ah Hin and Te Soh Peng) in the following acts:

(i) they had wrongfully removed him as a director of the fourth respondent; A

(ii) they had wrongfully transferred shares owned by him in the fourth respondent prematurely and in breach of the relevant terms of the settlement agreement.

[5] The subject matter of the settlement agreement was the proceeds of a judgment dated 2 December 2011 obtained by the fourth respondent against the State Government of Terengganu in Kuala Terengganu High Court Civil Suit No. 22-06-2003 ("the Terengganu High Court judgment"). B

[6] At the time the present action was heard by the learned trial judge, the Terengganu High Court judgment was pending assessment of damages by the Senior Assistant Registrar. In other words, the exact amount of the proceeds of the judgment had yet to be known. C

[7] By the present action, the appellant sought, *inter alia*, the following declaratory reliefs: D

(i) a declaration that the settlement agreement dated 22 February 2010 was valid and binding on the first and second respondents;

(ii) an order directing the first, second and third respondents whether by themselves or through their agents or employees to refrain from selling, disposing of, and transferring the 4.9 million shares in the fourth respondent pending disposal of the action; E

(iii) an order directing that the appellant be retained as a director of the fourth respondent;

(iv) an order that the transfer of the 4.9 million shares in the fourth respondent, originally in the appellant's name, to the first and second respondents or to any third party be deemed invalid, void and of no effect. F

[8] At the trial, the following facts were agreed by the parties:

(i) the fourth respondent had no business activity, being a dormant company; G

(ii) the appellant was the promoter and had formed and registered the fourth respondent at his own expense and costs on 15 August 1998;

(iii) the fourth respondent was wholly owned by the appellant; H

(iv) the first directors and shareholders of the fourth respondent were the appellant and his son by the name of Tuan Zainal Abidin bin Tuan Mat;

(v) at its inception, the fourth respondent had two fully paid up shares; I

(vi) on 14 May 2001, the appellant raised a capital sum of RM4.9 million to increase the paid up capital of the fourth respondent to RM5 million. The shareholding of the fourth respondent was:

A (a) The appellant – RM4,995,000 shares.

(b) Tuan Zainal Abidin bin Tuan Mat – RM5,000 shares.

The appellant had invested RM5 million of his own funds in the fourth respondent;

B (vii) in October 2001, the State Government of Terengganu awarded a timber concession in Empangan Kedua, Hutan Simpan Tembat dan Petuan, District of Hulu Terengganu of about 41,000 acres to the fourth respondent;

C (viii) pursuant to two letters dated 31 October 2001 and 29 November 2001, the Terengganu State Government agreed to assign the said timber concession to the fourth respondent;

(ix) the appellant required a sum of RM5.3 million to pay the premium for the timber concession;

D (x) through one Yaacob bin Mat Yim, the first respondent (Tan Ah Hin) agreed to pay the premium of RM5.3 million in consideration of which the first respondent through his nominees was allocated 5 million shares in the fourth respondent;

E (xi) the fourth respondent's paid up capital was increased to RM10 million to accommodate this. The exercise was carried out in about October 2001 and as at 31 October 2001, the shareholding structure in the fourth respondent was as follows:

(a) Paid up capital – 10 million shares.

F (b) Shareholders

(1) the appellant: 4,995,000 shares.

(2) Tuan Zainal Abidin bin Tuan Mat: 5,000 shares.

(3) Astral Sun Sdn Bhd: 2,000 shares.

G (4) Amalglow Engineering Sdn Bhd: 3,000 shares;

(xii) Tuan Zainal Abidin bin Tuan Mat was the appellant's nominee whilst Astral Sun Sdn Bhd and Amalglow Engineering Sdn Bhd were the first respondent's nominees;

H (xiii) on 15 August 2002, the Terengganu State Government terminated the timber concession agreement with the fourth respondent;

(xiv) on 3 February 2003, the fourth respondent commenced action against the Terengganu State Government in the Kuala Terengganu High Court ("the Terengganu Civil Suit") for the termination of the timber concession agreement. The main witnesses for the fourth respondent were the appellant and Yaacob bin Mat Yim;

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(xv) earlier, upon securing the timber concession agreement in October 2001, the first respondent had proposed for a public listing of the fourth respondent. The appellant agreed. The first respondent then took the fourth respondent through a journey of share restructuring, ending with the share structure and directorship as follows as at 22 February 2010:

	Director	Shares
(a) The appellant	Yes	Nil
(b) First respondent	Yes	4,700,000
(c) Second respondent	No	2,000,000
(d) Third respondent	Yes	2,300,000
(e) Kho Ah Tee	No	1,000,000

(xvi) the first and second respondents then entered into the settlement agreement with the appellant in relation to the Terengganu Civil Suit. The agreement recognised the following facts:

(a) that it was the appellant who established the fourth respondent;

(b) that the appellant was instrumental in securing the timber concession agreement for the fourth respondent; and

(c) that the appellant was entitled to 50% of the shares in the fourth respondent. This 50% represented the appellant's original investment of RM5 million in the fourth respondent;

(xvii) the following were the agreed terms of the settlement agreement between the appellant and the first and second respondents:

(a) that the appellant shall be appointed to liaise, negotiate and come up with a settlement plan for the fourth respondent with the State Government of Terengganu in respect of the Terengganu Civil Suit ("the final settlement amount");

(b) as consideration, the first and second respondents shall transfer 4.9 million shares in the fourth respondent to the appellant;

(c) the purpose of the transfer of the 4.9 million shares to the appellant was to secure the final settlement amount with the Terengganu State Government either by way of entering into a consent judgment or by way of a final judgment obtained from the court ("the final date");

(d) the appellant shall retransfer the 4.9 million shares to the first and second respondents only after a consent judgment was entered into or after a final judgment had been obtained from the court;

(e) the appellant shall be a director of the fourth respondent;

(f) the appellant shall be entitled to receive an amount equivalent to 50% of the final settlement amount subject to deductions spelt out as follows:

(i) the appellant undertook to bear any outstanding commission, royalty, tax, additional tax assessments which are payable on the 50% payment to be received by him; and

(ii) the appellant to bear all legal charges in relation to the said civil suit in connection with the preparation of the agreement and in connection with any settlement agreement entered into with the Terengganu State Government;

(g) the final settlement amount shall be paid directly to the fourth respondent;

(h) all taxes payable on the final settlement amount shall be paid by the parties respectively in their parts of the entitlements;

(i) the settlement agreement constituted the entire agreement between the parties, that is, that all negotiations or commitments made before the signing of the settlement agreement were superseded by the settlement agreement;

(j) in the performance of the terms of the settlement agreement, in or about September 2011, the 4.9 million shares were transferred to the appellant. The appellant was already a director of the fourth respondent since 22 February 2010;

(k) the Terengganu Civil Suit could not be settled and no consent judgment was recorded, so it went for trial;

(xviii) on 2 December 2011, after a full trial of the Terengganu Civil Suit, judgment was entered in favour of the fourth respondent against the Terengganu State Government on liability. The Terengganu High Court then made an order for damages to be assessed by the Senior Assistant Registrar and to be paid to the fourth respondent after the assessment;

(xix) the hearing of the assessment of damages was still continuing. The quantum of damages to be awarded has not yet been determined by the court.

[9] The following facts were not agreed by the appellant:

(i) that he made the representations;

(ii) that pursuant to cl. 4 of the settlement agreement he must pay the identified payments before receipt of the final settlement amount;

(iii) that the "final date" was the date of the Terengganu High Court judgment although damages had yet to be assessed on the basis that liability had been determined.

[10] The central issue before the High Court and before us was whether the first and second respondents' act of retransferring the 4.9 million shares from the appellant to themselves after the fourth respondent obtained the Terengganu High Court judgment was premature and against the terms of cl. 2 of the settlement agreement.

[11] Whether or not the retransfer of the 4.9 million shares to the first and second respondents was premature and against the terms of cl. 2 of the settlement agreement turned on the question whether the Terengganu High Court judgment was a "final judgment", which by para. 2 cl. 2 of the settlement agreement also refers to "final date" and "final settlement amount".

[12] According to learned counsel for the appellant, this was "the only real issue" before the court. We reproduce below paras. 10.1 and 10.2 of counsel's written submission:

> 10.1 In summary the only real issue was whether the Judgment dated 12/02/2011 was a final judgment or an interlocutory judgment. If the former, then R1-R4's conduct in the retransfer of the shares was proper. If the latter, then R1-R4's conduct was premature and was conduct in breach of clause 2 of the Settlement Agreement.
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> 10.2 But in either event, the Settlement Agreement must still be valid and binding on the Appellant and R1-R4.

[13] Given the position taken by the appellant, we accordingly proceeded to determine the appeal on the premise that learned counsel had set out, which is, if the Terengganu High Court judgment was a "final judgment", the retransfer of the 4.9 million shares from the appellant to the first and second respondents would be valid and proper.

[14] Conversely, if the Terengganu High Court judgment was not a "final judgment" but an interlocutory judgment, the retransfer of the 4.9 million shares from the appellant to the first and second respondents would be premature and therefore invalid and the appellant would be entitled to succeed in this appeal and his claim against the respondents would be allowed in terms.

[15] The "only real issue" that learned counsel spoke of relates to cl. 2 of the settlement agreement, which reads:

> It is hereby agreed by all parties that the transfer of shares from the Transferor to Tuan Mat Tuan Ismail is for the purpose of securing Final Settlement Amount with the State Government of Terengganu either by way of entering into a consent judgment in respect of outside court settlement or by way of final judgment obtained from court ("Final Date").
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> It is hereby agreed by all parties that only after the stated Final Date above, Tuan Mat Tuan Ismail shall retransfer the whole shares back to the respective Transferor.

[16] Going by para. 1 of cl. 2 above, it is clear that the initial transfer of the 4.9 million shares to the appellant was for the purpose of securing a "final settlement amount" from the Terengganu State Government for its act of terminating the concession agreement.

[17] Obviously the duty to secure the "final settlement amount" from the Terengganu State Government rested on the appellant's shoulders as the transfer to him of the 4.9 million shares was meant for that specific purpose. It was not meant for his personal benefit without him having to make any effort to secure the "final settlement amount" from the Terengganu State Government.

[18] This obligation on his part was made clear by cl. 1 of the settlement agreement which provides as follows:

> In consideration of the Transferor agreeing to transfer the share units to the Transferee, all parties to this agreement do hereby agree to appoint the Transferee to liaise, to negotiate and to come up with the settlement plan for the Company with the Terengganu State Government in respect of the said case ("Final Settlement Amount") and the Transferee do accept the appointment upon the terms and conditions hereinafter set out.

[19] The manner as to how the "final settlement amount" was to be secured is stipulated by cl. 2 of the settlement agreement which provides that it was to be done by either of the following alternatives:

(i) by recording a consent judgment between the fourth respondent and the Terengganu State Government; or

(ii) by the fourth respondent obtaining a final judgment from the court against the Terengganu State Government.

[20] The question then arose: Did the appellant carry out his contractual obligation to secure the "final settlement amount", and if so when was he obligated to retransfer the 4.9 million shares to the first and second respondents?

[21] This was key to the issue and the answer lies in para. 2 cl. 2 of the settlement agreement, which provides that the retransfer was to be effected either:

(i) after a consent judgment had been recorded between the fourth respondent and the Terengganu State Government; or

(ii) after "final judgment" had been obtained from the court by the fourth respondent, if no consent judgment could be recorded.

[22] It is important to note that cl. 2 of the settlement agreement does not say that the retransfer of the 4.9 million shares from the appellant to the first and second respondents could only be done after the quantum of damages had been assessed and determined by the court. It merely says that the retransfer of the shares was only to be done after "final judgment" had been obtained from the court (where no out of court settlement could be reached).

[23] As it turned out, no out of court settlement was reached between the fourth respondent and the Terengganu State Government and thus no consent judgment was recorded. What transpired was, the fourth respondent obtained judgment against the Terengganu State Government in the Kuala Terengganu High Court for terminating the timber concession agreement. It was a judgment on liability after a full trial of the action.

[24] The material parts of the Terengganu High Court judgment read as follows:

> MAKA ADALAH HARI INI DIPERINTAHKAN bahawa tuntutan Plaintiff terhadap Defendan dibenarkan atas isu liability dan tuntutan balas Defendan terhadap Plaintif ditolak dengan kos DAN AKHIRNYA ADALAH DIPERINTAHKAN bahawa ganti rugi hendaklah ditaksirkan oleh Penolong Kanan Pendaftar dan dibayar oleh Defendan kepada Plaintif seperti ditaksirkan.

[25] The appellant did not dispute that this was a "judgment obtained from court" within the meaning of cl. 2 of the settlement agreement, with damages to be assessed by the Senior Assistant Registrar. His dispute was over the question whether the judgment was a "final judgment".

[26] The appellant's contention was that the Terengganu High Court judgment on liability was only an interlocutory judgment and not a final judgment. His reasoning was that unless and until the quantum of damages had been finally determined by the Senior Assistant Registrar, the judgment remained an interlocutory judgment. In other words, it was a suspended judgment pending assessment of damages.

[27] It follows, according to learned counsel, that until the amount of damages had been finally determined by the Senior Assistant Registrar, the respondents had no right to retransfer the 4.9 million shares from the appellant to the first and second respondents, for the simple reason that the time for the retransfer of the shares had not come. In other words, the judgment on liability had not become final. The respondents contended otherwise.

[28] Thus, on the issue of when was the appellant obligated to retransfer the 4.9 million shares to the first and second respondents, the dispute was over the construction to be given to the phrase "final judgment" in cl. 2 of the settlement agreement. The construction that learned counsel for the appellant gave was as follows (para. 56 of counsel's written submission):

> 56.1 It is submitted that a determination as to liability does not finally or fully dispose of the rights of the parties where damages are also claimed in the action. That will only be a partial determination of the rights of the parties. The determination of liability is not an end in itself. Such a determination is not the only thing that R4 is asking for. Damages are really what R4 is seeking, and determining liability is a necessary step towards deciding whether damages or compensation are payable, and if so, what is the appropriate amount.

A On this view, an interlocutory judgment with damages to be assessed will not be an order which finally dispose of the rights of the parties in the action.

56.2 Therefore, the Judgment is interlocutory for 2 distinct reasons. First, there was no determination on the merits as to the rights of the B parties. Second, and more importantly, the Judgment was, in any event, interlocutory.

[29] Learned counsel's emphasis was clearly on the point that "final date" (which also refers to "final judgment") in cl. 2 of the settlement agreement means the "final settlement amount" which, having regard to the intention C of the contracting parties, refers the amount of damages as determined by the court after assessment of damages.

[30] What learned counsel was trying to say was that the words "final judgment" and "final settlement amount" must be read together and harmoniously in determining whether the Terengganu High Court judgment D on liability was a final judgment or an interlocutory judgment. This was how learned counsel articulated his argument, as laid out by the learned trial judge in his grounds of judgment at pp. 10-12, as follows:

(1) A reasonable interpretation of the "Final Settlement Amount ('FSA') appearing in clauses 1, 2 and 4 of the S/A when read E together means:

P liaising, negotiating and coming up with a settlement plan for D4 with the Terengganu State Government in connection with the civil case. Objectively, it can only mean that P shall come up with a quantum i.e. monetary sum that D4 could claim against the F Terengganu State Government.

It may be either by way of a consent judgment or final judgment. The phrase can only mean a monetary amount secured by any of the said 2 types of judgment payable by the Defendant in that case. P has to secure that amount either by way of agreement with the Defendant or via judicial determination by the Court by assessment G of the quantum payable by the Defendant.

This is clear from a reading of clause 4 which entitles P to 50% of the FSA subject to deductions of payments due from P.

This construction is also consistent with the background facts of this case where P contributed 50% of the paid up share capital of D4 and H thereby, was entitled to 50% of the FSA.

(2) The judgment dated 02.12.2011 is certainly not a final but only an interlocutory judgment as it had only decided on the issue of liability only in favour of D4 and left the issue of quantum to be determined by way of assessment of damages. [Reference made to I Halsbury's Laws of England 4th Edition paragraph 506].

(3) The 'Final Date' in the S/A should be the date when the Final Settlement Amount has been secured either by a consent judgment or by a final judgment. That date is when the Senior Assistant

> Registrar has assessed the amount of damages payable by the Terengganu State Government to P. The parties agreed that the Court has not yet determined the amount payable on the assessment hearing.
>
> Therefore the "Final Date" has not arrived yet.

[31] The learned trial judge rejected the argument and accepted the respondents' construction and held as follows:

> [15] In regard to the issue whether the KTHC had entered final judgment which would enable the 4.9 million shares to be retransferred to D1 and D2, the important question for consideration is whether the Court had merely made an interlocutory order and not a final decision based on the definition above relied on by P. In my considered view it is incorrect and erroneous to consider the Court's finding on liability after a full trial to be merely an interlocutory order. The Court had fully heard evidence and had given judgment on liability of the defaulting party leaving only the issue of damages to be assessed, which is a process for a consequential order to be made by the Registrar. Clauses 1 and 2 of the S/A are clear and explicit that final settlement may be reached with the Terengganu Government by either out of court settlement or final judgment by the Court. In this instance the KTHC had undoubtedly finally adjudged or determined the issue of liability of the Defendant to pay damages to D4, leaving only the issue of quantum to be decided by the Registrar.

[32] We agreed with the learned trial judge and had nothing substantial to add save to emphasise the point that the Terengganu High Court judgment was indeed a final judgment as it had finally determined the Terengganu State Government's liability to pay damages to the fourth respondent for its wrongful termination of the timber concession agreement. The order for payment of damages was implicit in the judgment, except that the quantum was to be determined by way of assessment by the Senior Assistant Registrar.

[33] The word "interlocutory" which learned counsel used to describe the Terengganu High Court judgment is a legal term and is defined by *Barron's Dictionary of Legal Terms* (5th edn) as follows:

> provisional; temporary. An order or judgment that does not determine the issues but directs further proceeding preliminary to a final order or decree. Until final decree, an interlocutory judgment is subject to change by the court to meet the needs of the case and is not appealable except by leave of court.

[34] *The Oxford Dictionary of Law* (7th edn) gives the following meaning to the word:

> During the course of proceedings. Before the introduction of the Civil Procedure Rules in 1999, the term was applied to certain processes in civil proceedings occurring between the initiation of the action and the final judgment (such as interlocutory injunctions). Under the Civil Procedure Rules, it has been replaced by the term interim.

[35] In *Halsbury's Laws of England* (4th edn) the learned authors at para. 506 defined the word to mean:

> An order which does not deal with the final rights of the parties, but either (1) is made before judgment, and gives no final decision on the matters in dispute, but is merely on a matter of procedure, or (2) is made after judgment, and merely directs how the declaration of rights already given in the final judgment are to be worked out, is termed "interlocutory".

[36] In *Bozson v. Altrincham Urban Council* [1903] 1 KB 547 Lord Alverstone CJ laid down the following test to determine if a judgment is final or interlocutory:

> It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order.

[37] Clearly, the Terengganu High Court judgment on liability was not a provisional or temporary judgment. Nor was it subject to change or alteration by the court. The entry of the judgment was also not a process that occurred between the filing of the Terengganu Civil Suit and the pronouncement of the judgment, such as an interlocutory injunction.

[38] It was a judgment that was reached after a full hearing, during which both oral and documentary evidence were adduced by the parties. Nor does the judgment fall within the definition given in *Halsbury's Laws of England (supra)* as it was not an "order" made before or after judgment, or merely on a matter of procedure, but was a final judgment on the liability of the Terengganu State Government to pay damages to the fourth respondent.

[39] The fact that damages was to be assessed was merely a consequential process to determine the quantum that the fourth respondent was entitled to. But in so far as the judgment itself was concerned, it was a final judgment.

[40] It was untenable in our view to argue that the order for assessment of damages had the effect of altering the status of the judgment from that of a final judgment to that of an interlocutory or temporary judgment, or that it had the effect of qualifying the finality of the judgment merely because the amount of damages had yet to be determined by the court.

[41] It is true that under cl. 2 of the settlement agreement, it was agreed by the parties that "final judgment" means the "final settlement amount", which was to be procured either through an out of court settlement or through a court judgment.

[42] But that was a private arrangement between the parties. Being a private arrangement between the parties, it could not have the effect of determining the finality of the court judgment. It was not for the parties to decide if the Terengganu High Court judgment was final or otherwise. That will be to usurp the function of the court.

[43] What was agreed between the parties was that the first and second respondents had the right to retransfer the shares to themselves once the Terengganu State Government was held by the court to be liable to pay damages to the fourth respondent. That was exactly what the High Court decided in the Terengganu Civil Suit, and that was all that was required to trigger enforcement of the second paragraph of cl. 2 of the settlement agreement.

[44] There is another reason why in our view the Terengganu High Court judgment on liability was a final judgment and this is because it was appealable without leave of the court. Only a judgment or order that is final in effect can be appealed against. This is not so in the case of an interlocutory judgment with no element of finality. The fact that the matter had been fixed for assessment of damages is irrelevant if otherwise the judgment on liability was final in effect.

[45] It was therefore incorrect for the appellant to say that the Terengganu High Court judgment only becomes final after the "final settlement amount" (damages) had been determined by the court.

[46] In any event, there is nothing to stop the appellant from claiming his 50% share of the "final settlement amount" from the fourth respondent after damages had been assessed, subject to deductions of any payment due from him. That, after all, was the scheme of arrangement between the parties.

[47] Other than the finality of the Terengganu High Court judgment, it was also the respondents' case in answer to the appellant's claim that the retransfer of the 4.9 million shares to the first and second respondents and the appellant's removal from the fourth respondent were both valid as the settlement agreement had been terminated due to the appellant's own breach of its fundamental terms.

[48] The appellant on the other hand contended that the appellant had been wrongfully removed as a director of the fourth respondent. It was pointed out that there is no provision in the settlement agreement for the removal or resignation of the appellant as director of the fourth respondent and that in fact, by virtue of cl. 3, all the parties agreed that the appellant would be a director of the fourth respondent.

[49] Learned counsel's argument on this issue is encapsulated in the following three paragraphs of his written submissions:

> 9. The High Court fell into error in failing to appreciate the real reason advanced as pleaded by R1-R4 for the transfer of the shares and the removal of the Appellant as a director of R4. Therefore the High Court had considered irrelevant matters in the form of the alleged misrepresentations and non-payment of the prescribed payments in clause 4(a) and (b) of the Settlement Agreement. These 2 allegations were not the reasons for the transfer of the shares to R1 to R2 and the removal of the Appellant as a director of R4 …

A 40.2 The fundamental error that the High Court made was to find that the Appellant had breached the Settlement Agreement by the failure to negotiate a settlement with the State of Terengganu and by non-payment of the prescribed payments under clause 4(a) thereby entitling R1-R4 to transfer the shares to R1 and R2 BUT the High Court had failed to recognize that the only reason advanced by R1 B to R4 for the transfer of the shares was that the Final Date had been determined by the Judgment under clause 2. Therefore the High Court had considered irrelevant matters and unpleaded allegations for the transfer of the shares.

41 In the premises the High Court had clearly misdirected itself on the C law and on the facts. There was simply no proper appreciation of the evidence in totality.

[50] What we could gather from the argument was that the learned trial judge had decided the case on a completely wrong footing, which if true would constitute an error of law warranting our intervention.

D **[51]** The thrust of the appellant's argument was that instead of focusing his mind on the "final date" to determine the right time for the retransfer of the 4.9 million shares to the first and second respondents, the learned trial judge went off tangent by concentrating on the appellant's failure to negotiate a settlement with the Terengganu State Government and also by his non-E payment of the prescribed payments under cl. 4(a) of the settlement agreement.

[52] It was pointed out that this was not the pleaded case of the respondents and should not have been given any consideration by the learned trial judge, the law being settled that parties are bound by their pleadings. In other F words, it was wrong for the learned trial judge to have made out a case for the respondents when it was not what the respondents themselves pleaded in their statement of defence.

[53] It was argued that on the pleadings, the issue before the learned trial G judge was not whether the appellant had breached the settlement agreement by failing to discharge his obligations under the settlement agreement but whether the time had come for him to retransfer the 4.9 million shares to the first and second respondents.

[54] Given the nature of the complaint and to provide context, we think H it is necessary to reproduce *in extenso* the relevant parts of the learned trial judge's grounds of judgment, as follows:

> [12] Secondly, PW1 [the appellant] had clearly failed to perform his obligations under clause 2 of the JVA and was, thus, in breach of trust set out in this clause. PW1 had not in any way participated in securing I settlement of the Terengganu case whether through final judgment and/or out of Court settlement. PW1's assertion that he had taken various steps in this regard was shown to be nothing but a bare assertion not supported by any evidence and plainly untrue based on the events that transpired.

…

[16] Be that as it may, regardless of the progress or outcome of the KTHC suit, the essential question arising from the pleaded Defence is whether P [the appellant] had breached clause 2 of the S/A in regard to securing final settlement or out of court settlement in that suit. As correctly pointed out by the Defence, P had only made bare allegations of compliance with clause 2 without providing any proof of the same. Neither did he proffer any reasonable explanation for this failure or omission to discharge his contractual obligations. The Defence position on this matter was confirmed by DW2, the solicitor for D4 at the material time, to the effect that P was not involved in the negotiations with the TSLA for the settlement of the said suit on 17.01.2012.

[17] PW1 had also admittedly breached his undertaking under Clause 4 of the JVA, specifically sub-clauses a) and b), when he failed to make any of the prescribed payments that he was obliged to make in respect of the suit. He made a bare assertion that he had paid the legal fees of the solicitors representing D4 at the material time (M/S Thayalan and Associates) in the said suit but was unable to produce any proof whatsoever, Clause 4(2) contains an unequivocal undertaking by PW2 to bear all legal charges in connection with the said suit which, on the evidence, PW2 blatantly breached. All payments that PW1 had allegedly made towards legal and professional fees were proven not to be not true at all. A cheque that he had issued for RM245,000.00 for the professional fees was dishonoured and he failed to pay legal fees of about RM1.3 million. He appeared to have given false evidence in regard to payments made pursuant to Clauses 4 a) and b). When questioned why he had not complied with Clauses 4 a) and b), the reason advanced that he was entitled to hold on until he had received 50% of the settlement sum was wholly untenable and in breach of the express terms of the S/A.

[18] Thirdly, D1 had produced unrebutted documentary evidence proving that he had expended more than RM22,000,000.00 for the interests of D4 whereas PW1 had failed to make any payment whatsoever towards any of D4's interests, including the project in Terengganu and the said KTHC civil action. He had only made bare assertions without any evidence which remained unproven throughout the trial. On the contrary, he had utterly failed to discharge his obligations and the responsibilities towards D4 under the S/A as undertaken in return for the 4.9 million units that he had received without payment. D1 (DW1) on the other hand supported his statement with several vouchers produced in Court which went unchallenged. So too was DW1's assertion that he was the main developer of D4 in carrying out the logging project and corporate restructuring whereas PW2 had practically done nothing save for making unfulfilled promises and false representations in regard to securing resolution of the dispute with the Terengganu Government.

[19] Fourthly, PW1, purportedly a witness of truth, wholly lacked credibility. His evidence in several instances was filled with contradictions, discrepancies and was contrary to the agreed documentary evidence as well as statements on material issues that were inherently incredible and did not make any sense. He had further misled (sic) the Defendants as

A to his connections with persons in authority in the Terengganu particularly the MB and the State Ruler, that led to D1 and D2 entering into the S/A and transferring ownership of 4.9 million units of shares to him in anticipation of his services and contribution in respect of the KTHC suit. There was a total failure of consideration on his part that the overall evidence manifestly disclosed.

B

[20] His credibility was further eroded by several material aspects of his evidence alluded to in the Defence submission. Inter alia PW2's evidence that he owned the 4.9 million shares in D4 before executing the S/A was shown to be false. PW2's denial of the fact that he was no longer a majority shareholder of D4 from 2002 to 2010 contradicted item 16 of the C Agreed Facts as well as the company records. He also disputed clause 2 of the S/A as to the agreed purpose of D1 and D2 transferring 4.9 units of shares in D4 to him but instead maintained that he was the original owner of these units. This stance taken by him that contradicted undisputed facts reflected a serious lack of creditworthiness.

D [21] For the foregoing reasons, I concluded that the Plaintiff himself was in breach of contract when he failed to discharge his obligations under the S/A and failed to comply with its fundamental terms as per the Clauses adverted to above of which he was patently and indisputably in breach. On account of this, I upheld the defence contention that D1 and D2 had the right to terminate the S/A for failure of consideration and redeem the E 4.9 million shares transferred to him. As regards his removal as director of D4, PW1 had failed to show that the removal was not in accordance with law and/or the Articles of Association of D4. Lastly, as D4 had obtained final judgment in the Terengganu suit solely through the efforts of D1 who engaged and financed solicitors without any assistance from PW2, D1 and D2 had no further obligation under the S/A to maintain F the said shares in the name of PW2 on account of his breach of fundamental terms of the S/A.

[22] PW1's breach of undertaking stipulated in clause 4(b) of the S/A was undoubtedly of a serious nature that went to the root of the contract and entitled the Defendants to rescind and seek restitution of the parties to G the *status quo* …

[23] I am in agreement with the Defence contention that the Defendant had the right to rescind and terminate the contract in view of the above breach of a fundamental term of the contract as it concerned the failure to honour the undertaking to secure final settlement with the Terengganu Government which was the very purpose of the S/A as stipulated.

H

[55] It was submitted that the attack by the learned trial judge on the credibility of the appellant was an irrelevant exercise as it was based on a wrong or improper understanding of the evidence and on errors of law in the interpretation of the settlement agreement.

I **[56]** We were unable to accede to the argument. In our view the learned trial judge was not wrong to direct his mind to the question of whether the appellant had breached the settlement agreement. The evidence was before him and it was his duty to consider the evidence unless it was inadmissible, such as being hearsay, which was not the case here.

[57] Whether the settlement agreement had in fact been breached must to be determined based on facts which in turn depended on the learned trial judge's assessment of the credibility of the witnesses.

[58] Surely, the question whether the appellant had taken steps to secure the "final settlement amount" with the Terengganu State Government as required of him by cls. 1 and 2 of the settlement agreement was a question of fact with respect to which a finding was necessary for the learned trial judge to come to a decision whether the appellant had breached the settlement agreement or otherwise.

[59] As for the issue of unpleaded material facts raised by learned counsel for the appellant, we found no substance to the argument as evidence on the breach of the settlement agreement by the appellant was adduced by the respondents during the trial and no objection was raised by the appellant.

[60] In this regard the decision of the then Supreme Court in *Superintendent of Lands and Surveys, 4th Division & Anor v. Hamit Matusin & Ors* [1994] 3 CLJ 567; [1994] 3 MLJ 185 is relevant, where it was held (1) as follows:

> The underlying well-known rationale for requiring material facts to be pleaded is to prevent the opposing party from being taken by surprise by evidence which departs from the pleaded material facts. However, when evidence represented a departure from the pleadings, it should be objected to when and where it was adduced, and it would be too late when it was only objected to later on, as in the final submission at the close of evidence in the instant appeal. Otherwise, in the event of such an objection being accepted by the court, the party adducing such evidence may face the risk of being denied leave to amend his pleadings at that stage.

[61] We agreed with the learned trial judge that the appellant's breach of the settlement agreement entitled the respondents to put an end to the agreement as the breach was of a fundamental nature going to the root of the contract.

[62] The appellant was supposed to discharge his obligations under the settlement agreement, but in breach of the agreement, he failed to do so, and yet insisting that he should retain the 4.9 million shares for himself on the purported ground that no "final judgment" or "final settlement amount" had been obtained from the court.

[63] Under the circumstances the respondents had the right to rescind the contract and to seek restitution of the parties to the *status quo*: *S & M Jewellery Trading Sdn Bhd & Ors v. Fui Lian-Kwong Hing Sdn Bhd* [2015] 8 CLJ 16 FC. Section 40 of the Contracts Act 1950 is also relevant and provides as follows:

A When a party to a contract has refused to perform or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence.

[64] On the pleadings and on the evidence before him, we were of the view B that the learned trial judge was perfectly entitled to come to a finding that the appellant had breached the settlement agreement. With respect, we found no basis for learned counsel to contend that the learned judge had committed errors of law or had mishandled the facts or was confused as to the issues to be tried.

C **[65]** As can be seen from the grounds of judgment, the finding was made after a careful and meticulous examination of the evidence by the learned trial judge and after considering the arguments by both sides.

[66] The principle is clear that an appellate court does not interfere willy nilly with findings of fact made by the trial judge, more so where the findings D involve the question of the credibility of the witnesses, unless it can be shown that the findings are plainly wrong or perverse or that the trial judge has failed to take proper advantage of his having seen and heard the witnesses giving evidence.

E **[67]** We did not find that to be the case in the present appeal as the finding of the learned trial judge was based on actual evidence before him and he had not misdirected himself either on the law or on the facts.

[68] There is authority to say that if the findings of the trial court are reasonably open on the evidence, it is not enough to warrant their reversal F just because an appellate court would have come to a different view: See the dissenting judgment of Raja Azlan Shah FJ (as His late Royal Highness then was) in *Samar Mansor v. Mustafa Kamarul Arifin* [1974] 1 LNS 147; [1974] 2 MLJ 71.

[69] Thus, even if we were disposed not to agree with the learned trial G judge's conclusion on the finality of the Terengganu High Court judgment, our view was that the learned trial judge was right in any event to hold that the settlement agreement had been properly terminated by the respondents due to its breach by the appellant, thereby validating the retransfer of the 4.9 million shares to the first and second respondents.

H **[70]** It is pertinent to note that the appellant himself admitted that he failed to comply with cl. 2 and cl. 4(b) of the settlement agreement. The breach had therefore been established by the appellant's own admission. Such admission carried more weight than evidence, oral or documentary, coming from the respondents.

I

[71] As for the appellant's removal from the fourth respondent, we had no reason to disagree with the learned trial judge that the appellant failed to show that his removal was not in accordance with the law or the Articles of Association of the fourth respondent. On the evidence before him, the learned trial judge was entitled to come to that conclusion.

[72] It was for all the reasons above-stated that we dismissed the appellant's appeal with costs RM20,000 payable to respondents (1) to (4) and RM5,000 to respondent (5) subject to payment of the allocator fee. The deposit was refunded to the appellant.